Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1156

CURTIS B. DANNING, Trustee for the Estate of Solomon Block, and MARVIN A. LIGHTIG,

Petitioners,

vs.

ROBERT M. LOEFFLER, Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The Petitioners, Marvin A. Lichtig and Curtis B. Danning, respectfully pray that a Writ of Certiorari issue to review dismissal of the appeal of Curtis B. Danning, Trustee for the Estate of Solomon Block, and Marvin A. Lichtig by the United States Court of Appeals for the Ninth Circuit.

CITATIONS TO OPINIONS BELOW

The Order of the Court of Appeals is attached hereto as Appendix A and no opinion was rendered by this Court. The Order of the United States District Court for the Central District of California is not reported and no opinion was rendered by the Court.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit was entered on November 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Circuit Court properly dismissed the appeal before it on the ground that it had no jurisdiction, that the Order was a non-appealable interlocutory order and was premature and that the appellants were not "aggrieved parties" entitled to take an appeal.

STATEMENT OF THE CASE

On April 5, 1973, Equity Funding Corporation of America ("EFCA") filed a Petition for Reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Central District of California. EFCA's petition was assigned to the Honorable Harry D. Pregerson, United States District Judge, who approved EFCA's Petition on April 5, 1973.

On December 5, 1974, Petitioner Curtis B. Danning, as Trustee in Bankruptcy for the Estate of Solomon Block, filed a claim in EFCA's Reorganization Proceedings for $800,000,000. On December 5, 1974, Petitioner Marvin Al Lichtig filed his claim in the amount of $250,000,000. Both of such claims were based upon theories of indemnity, subrogation and contribution for liabilities Petitioners have or will incur as a result of the fraud perpetrated upon them by certain of EFCA's former directors, officers and employees.

On July 24, 1975, an Amended Plan of Reorganization (the "Plan") was proposed

by Robert Loeffler, EFCA's Trustee (the "Trustee") which was presented to Judge Pregerson for consideration. Although no objection to either of Petitioner's claims was sustained, except to the extent that such claims were based on a theory of indemnification, no provision was made in the Plan for the payment of either of such claims.

On July 24, 1975 Judge Pregerson ordered that the Plan be submitted to the Securities and Exchange Commission (the "SEC"). Judge Pregerson's Order (the "Order") was made pursuant to Section 172 of the Bankruptcy Act (11 U.S.C. § 572).

On August 5, 1975, the Petitioners took an appeal of the Order of the District Court to the United States Court of Appeals for the Ninth Circuit. On September 22, 1975, the "Trustee" moved to dismiss their appeal.

The Court of Appeals dismissed the appeal on the basis that it lacked jurisdiction on November 19, 1975.

REASONS FOR GRANTING THE WRIT

The writ should be granted to resolve a conflict among the several United States Courts of Appeal whether interlocutory orders of the District Courts under Section 24(a) of the Bankruptcy Act (11 U.S.C. § 47(a)) are orders appealable to the Courts of Appeal.

ARGUMENT

I

The Interlocutory Order Involved Was An Appealable order

Section 24(a) of the Bankruptcy Act (11 U.S.C. §47(a)) states:

> "The United States courts of appeals . . . are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact. ..."

"Proceedings in bankruptcy" have been defined as:

> "... 'those matters of an administrative character ... which are presented in the ordinary course of the administration of a bankrupt's

> estate.'" In re National Finance and Mortgage Corp., 96 F.2d 74, 75 (9th Cir. 1938).

"Controversies arising in proceedings in bankruptcy" arising under Section 24 have been said to:

> "... embrace those matters arising in the course of a bankruptcy proceeding which are not mere steps in the administration of the estate, but which give rise to distinct and separable issues between the trustee and adverse claimants, concerning the right and title to the bankrupt's estate." Chicago Bank of Commerce v. Carter, 61 F.2d 986, 989 (8th Cir. 1932).

There can be little doubt that the appeal erroneously dismissed by the Court of Appeals was from a "proceeding in bankruptcy."

The present version of Section 24(a) extensively altered pre-existing law with regard to appeals from "proceedings in bankruptcy could be taken only upon

allowance by the appellate court in its discretion, except in three situations enumerated in former Section 25(a): (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over.

In 1938, when the present version of Section 24(a) was enacted, the distinctions between permissive appeals and matters appealable as of right were largely removed. Under present Section 24(a), the following principles govern appeals from "proceedings in bankruptcy": (1) all appeals from proceedings in bankruptcy are as of right (as distinguished from an appeal upon allowance by the appellate court), except in cases where the order of decree appealed from involves less than $500; (2) an appeal may be taken from either final or interlocutory orders, decrees or judgments; (3) the scope of review covers both law and fact, except in appeals from a judgment entered on a jury verdict, in which case the review

extends only to matters of law. 2 Collier on Bankruptcy ¶24.11 (14th Ed. 1972).

Prior to the present version of Section 24(a), some courts were reluctant to grant appeals from interlocutory orders in "proceedings in bankruptcy" on the grounds that such appeals were "not favored" and that they would result in trying proceedings "in piecemeal". See In re Horowitz and Laidholm, 250 Fed. 106, 107 (2d Cir. 1918); Pearson v. Higgins, 34 F.2d 27, 28 (9th Cir. 1929), cert. denied, 280 U.S. 593, 50 S.Ct. 39, 74 L.Ed. 641 (1929). As stated by one learned treatise:

"Whatever the validity of these objections, such statements are now authoritative only in that they indicate that trivial, preliminary matters not amounting to a determination of issues will not be subject to review. Except for those orders which involve less than $500.00 and therefore still require allowance, and those orders adjudging no rights (such as an order to show cause) or in some cases orders involving only the

> trial court's discretion, all interlocutory orders in 'proceedings in bankruptcy' are appealable as of right. Generally speaking, the appellate court's discretion as to the advisability of the appeal is immaterial." 2 Collier on Bankruptcy ¶24.11 (14th Ed. 1972) [Emphasis added]

The "Trustee" in his motion to dismiss the appeal cited the cases of In re Chicago Rapid Transit Co., 200 F.2d 341 (7th Cir. 1953) and Dubnoff v. Goldstein, 385 F.2d 717 (2d Cir. 1967) for the proposition that "only those orders which 'substantially determine some issue' are reviewable on appeal" pursuant to Section 24(a) of the Bankruptcy Act. Each of these authorities is either distinguishable from or inapplicable to the case at hand.

In re Chicago Rapid Transit Co., supra, involved an appeal from the denial of a motion to disqualify a district judge and a special master. The appellate court denied the appeal because the motion in

the lower court had been untimely filed. (200 F.2d 342) Furthermore, the court's decision seems to be limited to the facts of the case, i.e., that the denial of a motion to disqualify is not, of itself, an appealable order. (See 200 F.2d 343).

In the present case, it cannot be said that the Order determined "nothing with respect to the administration of the Estate" or failed to "decide some step in the course of the proceedings". This is because Section 172 allows a judge to submit a plan to the SEC only if he regards it "as worthy of consideration". Thus, Judge Pregerson's decision that the Plan was worthy of consideration was a step in the course of these proceedings which determined a substantive issue on the merits. The Order submitting the Plan to the SEC pursuant to Section 172 thus constituted a determination respecting the administration of this estate.

Like the Chicago Rapid Transit case, supra, Dubnoff dealt with the denial of the appellant's motion to have a district judge disqualify himself. In Dubnoff, the court stated:

> "'It is clear that to be appealable an interlocutory order must have the character of a formal exercise of judicial power affecting the asserted rights of a party; that it must ... decide some step in the course of the proceeding.'" (385 F.2d 722)

Certainly the instant Order was a "formal exercise" of judicial power, it being made pursuant to Section 172, and it certainly affected asserted rights of Appellants because the district court was deeming as "worthy of consideration" a plan which failed to make any provisions for satisfying Appellants' claims or the claims of those in a similarly category. The Plan is therefore, neither "fair and equitable" nor "feasible" as required by Sections 174 and 221(2) of the Bankruptcy Act (11 U.S.C. §§ 174 and 621(2) and is certainly not "worthy of consideration".

The "Trustee" also cited the case In re Pechin, 227 Fed. 853 (3d Cir. 1915) for the proposition that Section 24(a) does not allow appeals to "be taken from

orders relating to mere preliminary or procedural matters".

The Pechin case, which involved the appeal of an order of a district court allowing the trustee to amend his specifications of objections to discharge, is inapplicable because it was decided before the 1938 amendment of Section 24 when the appellate courts had discretion to accept or deny all but certain limited classes of appeals.

The transmission of the Plan to the SEC is not at all closely analogous to the submission of matters to a special master for advice because the latter are discretionary while the former, in a case such as this, is statutorily required. The element of discretion present in the submission of a matter to a special master is totally lacking in the submission of a plan to the SEC.

The Petitioners further claim that the district court abused its discretion in deeming the Plan "worthy of consideration". How a plan which fails to make any provision for satisfying $1,050,000,000 of claims can be anything but unfair,

inequitable and unworkable is the question which was before the District Court. The preemptory imprimatur of fairness inherent in the "worthy of consideration" order is incredible especially since there was no objection pending with respect to The Danning and Lichtig claims.

Commenting on the possible objection that the appeal taken by Danning and Lichtig to the Ninth Circuit would result in "piecemeal review", one learned treatise has stated that such an objection is no longer valid as to cases under Section 24(a), as revised in 1938. See 2 Collier on Bankruptcy ¶24.11 (14th Ed. 1972).

Although Appellee claims that the review sought by Appellants will benefit no one, such a bold assertion seems to ignore the facts. If the Court agrees with the Petitioners that the Court of Appeals should have ruled on the question whether the district court abused its discretion in deeming the Plan worthy of consideration, considerable time and expense will be saved by the SEC in avoiding review of a plan which cannot be confirmed and the reorganization proceedings

will be hastened rather than lengthened because they will not have to await the SEC's futile review.

II

Petitioners Had Standing to Appeal The Order

Since Section 25 of the Bankruptcy Act has been superseded by Rules 4(a) and 6 of the Federal Rules of Appellate Procedure (See Advisory Committee's Note to Appellate Rule 4(a), Subdivision (a)), neither of which make any mention to "aggrieved parties" (as does Section 25) the Petitioners need not have been "aggrieved parties" in order to have standing to appeal the order of the district court.

It should be noted that Rule 4 of the Federal Rules of Appellate Procedure states:

> "In a civil case (including a civil action which involved ... a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by

> law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from ...."

As previously stated, the appeal in this case is permitted by law "as of right" by Section 24(a) of the Bankruptcy Act.

Furthermore, Petitioners herein[1/] are "aggrieved" by the order of the district court which was the subject of their appeal to the Court of Appeals. Inherent within the Order is the district court's determination that the Plan is "worthy of consideration". Since the Plan makes no provision for the claims of Appellants, and, as Appellants asserted in their Notice of Appeal, provides for an unlawful

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1/ Solomon Block has not been fully discharged from his personal bankruptcy proceedings as there are pending objections to his dischargeability, and therefore Appellant Danning does have an interest in continuing to represent Block in the EFCA Reorganization.

distribution of attorneys' fees out of proceeds of the estate, which would otherwise benefit the estate's claimants, including Appellants, the Order does detrimentally affect rights of the Appellants.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

NATHAN MARKOWITZ

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Curtis B. Danning, Trustee of the Estate of
Solomon Block

RICHARD A. DeSANTIS

Attorney for Petitioner
Marvin A. Lichtig

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 19, 1975

Emil E. Melfi, Jr., Clerk

U.S. COURT OF APPEALS

In the Matter of:

EQUITY FUNDING CORPORATION OF AMERICA, a Delaware corporation,

Chapter X

CURTIS B. DANNING, Trustee for the Estate of Solomon Block, and Marvin Al Lichtig,

Petitioners-Appellants

vs.

ROBERT M. LOEFFLER, Trustee,

Respondent-Appellee

No. 75-3294

ORDER

Before: KOELSCH and DUNIWAY, Circuit Judges

Upon due consideration of the motion to dismiss and opposition thereto, this appeal is dismissed for lack of jurisdiction.

s/ M. Oliver Koelsch

s/Ban C. Duniway

Mo Cal 11/17/75

Appendix A